

## **CHAPTER 17**

### **AVAILABILITY OF APPROPRIATIONS AS TO PURPOSE**

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## **CHAPTER 17**

### **AVAILABILITY OF APPROPRIATIONS AS TO PURPOSE**

#### **I. INTRODUCTION.**

*“It is difficult to see how a legislative prohibition could be expressed in stronger terms. The law is plain, and any disbursing officer disregards it at his peril.”* 4 Comp. Dec. 569, 570 (1898) (Comptroller of the Treasury discussing the Purpose Statute, 31 U.S.C. § 1301(a)).

#### **II. STATUTORY FRAMEWORK.**

##### **A. The Purpose Statute.**

##### **1. 31 U.S.C. § 1301(a) provides:**

Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.

##### **2. Congress initially enacted this statutory control in the Act of March 3, 1809, 2 Stat. 535. This act, generally referred to as the “Purpose Statute,” was passed as part of a reorganization of the War, Navy, and Treasury Departments to limit the discretion of the Executive Branch in spending appropriations.**

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B. Defense Appropriations.

1. Appropriations Acts. The Department of Defense (DoD) has nearly one hundred separate appropriations available to it for different purposes.
2. Appropriations are differentiated by service (Army, Navy, etc.) and component (Active, Reserve, etc.), as well as purpose (Procurement, Research and Development, etc.).
  - a. The major DoD appropriations provided in the annual Appropriations Act are:
    - (1) Personnel—used for pay and allowances, permanent change of station travel, etc.;
    - (2) Operation & Maintenance (O&M) — used for the day-to-day expenses of training exercises, deployments, operating and maintaining installations, etc.;
    - (3) Procurement—used for production and modification of aircraft, missiles, weapons, tracked vehicles, ammunition, shipbuilding and conversion, and “other procurement,” and
    - (4) Research, Development, Test and Evaluation (RDT&E) — used for expenses necessary for basic and applied scientific research, development, test, and evaluation, including maintenance and operation of facilities and equipment.
  - b. DoD also receives smaller appropriations for other specific purposes (e.g., Overseas Humanitarian, Disaster, and Civic Aid, Chemical Agents and Munitions Destruction, etc.).
  - c. Congress appropriates funds for military construction separately.

C. Implementing the Annual Appropriations—Regulatory Guidance.

1. Accounting Guidance. The various federal agencies implement appropriations acts through funding guidance provided to subordinate activities. Service regulations assign codes for specific purposes. These codes track the various appropriations provided to DoD. The regulations and instructions also provide guidance regarding what types of expenses should be charged to each appropriation.
2. Programs. The accounting regulations of each agency further classify their accounts into programs, budget activities, and program elements for management purposes. Different program elements may or may not represent different appropriations or Congressionally “earmarked” funds within an appropriation. Therefore, charging one program element instead of another may or may not violate the Purpose Statute.

**III. DETERMINING THE PROPER PURPOSE OF AN APPROPRIATION.**

A. Three-Part Test for a Proper Purpose. Secretary of Interior, B-120676, 34 Comp. Gen. 195 (1954).

1. The expenditure of an appropriation must be for a particular statutory purpose, or **necessary and incident** to the proper execution of the general purpose of the appropriation.
2. The expenditure must not be prohibited by law.
3. The expenditure must not be otherwise provided for; it must not fall within the scope of some other appropriation.

B. Determining the Purpose of a Specific Appropriation.

1. Legislation.

- a. Organic Legislation. Organic legislation is legislation that creates an agency, establishes a program or prescribes a function. Principles of Fed. Appropriations Law, 2d ed., vol. I, ch. 2, 2-33, GAO/OGC 91-5 (July 1995). For example, the Secretary of Defense has a statutory mission to “identify, treat, and rehabilitate members of the armed forces who are dependent on drugs or alcohol.” 10 U.S.C. § 1090. (Note: Organic legislation rarely provides any money for the program or activity it prescribes).
- b. Appropriations Acts. Examine the language of the appropriations act for the year in question.
  - (1) When the language of the statute is clear, there is no need to resort to legislative history to determine congressional intent. United States v. Ron Pair Enters., Inc., 489 U.S. 235 (1989) (“plain meaning” rule); Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978); LTV Aerospace Corp., B-183851, Oct. 1, 1975, 55 Comp. Gen. 307, 317, 75-2 CPD ¶ 203.
  - (2) If the statutory language is unclear, or will lead to an absurd result, then consult the statute’s legislative history to determine congressional intent. See Mallard v. United States Dist. Court, 490 U.S. 296 (1989); Federal Aviation Admin.—Permanent Improvements to a Leasehold, B-239520, 69 Comp. Gen. 673 (1990) (conference report clearly indicated that \$5.7 million were available for a permanent improvement to a leasehold).

c. Authorization Acts.

- (1) Annual authorization acts generally accompany DoD's appropriation acts. Other federal agencies usually, but not always, have annual authorization acts. The authorization act may clarify the intended purposes of a specific appropriation, or contain restrictions on the use of the appropriated funds.
- (2) Authorizations are not appropriations, and do not provide funding to the agency.
- (3) Congress has prohibited the appropriation, obligation, or expenditure of funds for certain purposes (procurement, RDT&E, military construction) without separate statutory authorization. 10 U.S.C. § 114(a).
- (4) Frequently, Congress appropriates funds that have not been authorized, or in excess of the amount authorized. Unless otherwise prohibited, agencies may spend such funds. See Principles of Fed. Appropriations Law, 2d ed., vol. I, ch. 2, GAO/OGC 91-5 (July 1991); Civil Rights Comm'n, B-246541, 71 Comp. Gen. 378 (1992). But see 10 U.S.C. § 114(a).

2. Legislative History.

- a. Legislative history is the record of congressional deliberations that precede the passage of a statute. It is not legislation. Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978).
- b. Generally, the pertinent legislative history will consist of:
  - (1) Text of the bill;

- (2) Reports of the House Armed Services Committee, the Senate Armed Services Committee, the House Appropriations Committee, and the Senate Appropriations Committee;
    - (3) Conference reports;
    - (4) Floor debates reported in the Congressional Record; and
    - (5) Hearings.
  - c. The reports include P-1 and R-1 documents which may shed light on lawful uses of appropriations. ANGUS Chemical Co., B-227033, Aug. 4, 1987, 87-2 CPD ¶ 127. P-1 and R-1 documents are exhibits to DoD's budget submission which provide programmatic details to support the budget request. See generally DoD Fin. Mgmt. Reg., DOD 7000.14-R.
  - d. The legislative history is not necessarily binding upon the Executive Branch. If Congress provides a lump sum appropriation without statutorily restricting what can be done with the funds, a clear inference is that it did not intend to impose legally binding restrictions. SeaBeam Instruments, Inc., B-247853.2, July 20, 1992, 92-2 CPD ¶ 30; LTV Aerospace Corp., B-183851, Oct. 1, 1975, 55 Comp. Gen. 307, 75-2 CPD ¶ 203.
  - e. Informal approval by Congress does not justify an otherwise improper expenditure. Alberto Mora, Gen. Counsel, U.S. Info. Agency, B-248284.2, Sept. 1, 1992 (unpub.).
3. The President's Budget. The President's budget contains a detailed description of the purpose proposed for the requested appropriations. An agency may reasonably assume that appropriations are available for the specific purpose requested, unless otherwise prohibited. The budget contains P-1 and R-1 documents and Congressional Data Sheets.



C. The Necessary Expense Rule.

1. 31 U.S.C. § 1301(a) does not require Congress to specify every item of expenditure in an appropriations act. Agencies have reasonable discretion to determine how to accomplish the purposes of appropriations. See HUD Gun Buyback Initiative, B-285066, May 19, 2000. See also Department of Labor—Interagency Agreement between Employment and Training Admin. and Bureau of Int’l Affairs, B-245541, 71 Comp. Gen. 402 (1992); Department of the Army—Purchase of Commercial Calendars, B-211477, 62 Comp. Gen. 566 (1984).
2. An appropriation for a specific purpose is available to pay expenses necessarily incident to accomplishing that purpose. Secretary of State, B-150074, 42 Comp. Gen. 226, 228 (1962); Major General Anton Stephan, A-17673, 6 Comp. Gen. 619 (1927).
3. In some instances, Congress has specifically authorized expenditures as “necessary expenses” of an existing appropriation. See Air Force Purchase of Belt Buckles as Awards for Participants in a Competition, B-247687, 71 Comp. Gen. 346 (1992) (10 U.S.C. § 1125 authorizes the Secretary of Defense to purchase and award medals, trophies, etc. to members of armed forces for excellence in activities relating to the armed forces); 5 U.S.C. §§ 4501-4507 (Government Employees Incentive Awards Act).
4. Necessary Expense Defined.
  - a. “[A]n expenditure is permissible if it is **reasonably necessary** in carrying out an authorized function or will **contribute materially** to the effective accomplishment of that function. . .” Internal Revenue Serv. Fed. Credit Union—Provision of Automatic Teller Machine, B-226065, 66 Comp. Gen. 356, 359 (1987)(emphasis added).
  - b. A necessary expense does not have to be the only way, or even the best way, to accomplish the object of an appropriation. Secretary of the Interior, B-123514, 34 Comp. Gen. 599 (1955). However, a necessary expense must be more than merely desirable. Utility Costs under Work-at-Home Programs, B-225159, 68 Comp. Gen. 505 (1989).

5. Determinations are fact/agency/purpose specific. See Federal Executive Board—Appropriations—Employee Tax Returns—Electronic Filing, B-259947, Nov. 28, 1995, 96-1 CPD ¶ 130; Use of Appropriated Funds for an Employee Tax Return Program, B-239510, 71 Comp. Gen. 28 (1991).
  
6. Typical Questionable Expenses. Agencies may have specific guidance about “questionable” expenditures. See, e.g., AFI 65-601, vol. I., ch. 4, §§ K-O.
  - a. Clothing. Clothing is generally a personal expense. IRS Purchase of T-Shirts, B-240001, 70 Comp. Gen. 248 (1991) (Combined Federal Campaign T-shirts for employees who donated five dollars or more per pay period not authorized). But see 5 U.S.C. § 7903 (authorizes purchase of special clothing, for government benefit, which protects against hazards); White House Communications Agency—Purchase or Rental of Formal Wear, B-247683, 71 Comp. Gen. 447 (1992) (tuxedo rental or purchase for employees authorized); Internal Revenue Serv.—Purchase of Safety Shoes, B-229085, 67 Comp. Gen. 104 (1987) (safety shoes authorized).
  
  - b. Food.
    - (1) Generally, appropriated funds are not available to pay for government employees’ food or refreshments within their official duty stations. Department of The Army—Claim of the Hyatt Regency Hotel, B-230382, Dec. 22, 1989 (unpub.) (coffee and donuts unauthorized entertainment expense). However, agencies may pay, under **limited circumstances**, a facility rental fee that includes the cost of food. See Payment of a Non-Negotiable, Non-Separable Facility Rental Fee that Covered the Cost of Food Service at NRC Workshops, B-281063, Dec. 1, 1999, (unpub.) (payment of fee was proper because fee was all-inclusive, not negotiable, and competitively priced to those that did not include food).

(2) Exceptions.

(a) “Light Refreshments.”

- (i) The agency may consider the cost of “light refreshments” as part of the agency’s overall administrative costs of hosting government-sponsored conferences. See Federal Travel Regulation, Part 301-74. See also Joint Federal Travel Regulation (JFTR), Part G: Conference Planning, ¶ 2550; Joint Travel Regulation (JTR), Part S: Conference Planning, ¶ 4950.
- (ii) The conference must involve attendee travel. JFTR, ¶ U2550, D; JTR ¶4950, D. A “conference” is defined as a “meeting, retreat, seminar, symposium or . . . training activities that are conferences . . .” Id.

(b) Formal Meetings and Conferences. 5 U.S.C. § 4110.

- (i) The government may pay for meals while government employees are attending meetings or conferences if: 1) the meals are incidental to the meeting; 2) attendance of the employees at the meals is necessary for full participation in the meeting; and 3) the employees are not free to take meals elsewhere without being absent from the essential business of the meeting.
- (ii) However, this exception does **not apply to purely internal business meetings or conferences sponsored by government agencies.** Pension Benefit Guaranty Corp.—Provision of Food to Employees, B-270199, Aug. 6, 1996 (unpub); Meals for Attendees at Internal Government Meetings, B-230576, 68 Comp. Gen. 604 (1989).

- (iii) **NOTE:** This provision applies only to civilian employees. There is no corresponding provision for military members in Title 10 of the U.S. Code. But see ¶ 4510 of the Joint Federal Travel Regulation, that authorizes military members to be reimbursed for occasional meals within the **local area** of their Permanent Duty Station (PDS) when the military member is required to procure meals at personal expense outside limits of the PDS.
- (c) Training. 5 U.S.C. § 4109; 10 U.S.C. §4301.
  - (i) The government may provide meals if necessary to achieve the objectives of a training program. Coast Guard—Meals at Training Conference, B-244473, Jan. 13, 1992 (unpub.).
  - (ii) However, an agency’s characterization of a meeting as “training” is not controlling. Corps of Engineers—Use of Appropriated Funds to Pay for Meals, B-249795, May 12, 1993 (unpub.) (quarterly managers meetings of the Corps do not constitute “training”); See also Pension Benefit Guaranty Corp.—Provision of Food to Employees, *supra*. (food not proper training expense if unnecessary for employee to obtain full benefit of training).
- (d) Award Ceremonies. 5 U.S.C. § 4503 (civilian incentive awards); 10 U.S.C. § 1124 (military **cash** awards).

- (i) Defense Reutilization and Marketing Service Award Ceremonies, B-270327, March 12, 1997 (agency may spend \$20.00 per person for luncheons provided at awards ceremonies pursuant to the Government Employees Incentive Awards Act); Refreshments at Awards Ceremony, B-223319, 65 Comp. Gen. 738 (1986) (agencies may use appropriated funds to pay for refreshments incident to employee awards ceremonies [applies to both 5 U.S.C. § 4503 and 10 U.S.C. § 1124 which expressly permit agency to “incur necessary expense for the honorary recognition. . .”]).
- (ii) **NOTE: 10 U.S.C. § 1125 governs Secretary of Defense’s (SECDEF) authority to award medals, trophies, badges, etc. to members/units of armed forces for accomplishments. This statute does not have the express “incur necessary expense” language of 5 U.S.C. § 4503 or 10 U.S.C. § 1124.**

c. Entertainment.

- (1) Appropriated funds generally are not available to pay for entertainment. See HUD Gifts, Meals, and Entertainment Expenses, B-231627, 68 Comp. Gen. 226 (1989); Navy Fireworks Display, B-202518, Jan. 8, 1982, 82-2 CPD ¶ 1 (fireworks unauthorized entertainment); See also To the Honorable Michael Rhode, Jr., B-250884, March 18, 1993 (unpub.) (interagency working meetings, even if held at restaurants, are not automatically social or quasi-social events chargeable to the official reception and representation funds).

- (2) Agencies may use appropriated funds to pay for entertainment (including food) in furtherance of equal opportunity training programs. Internal Revenue Serv.—Live Entertainment and Lunch Expense of Nat’l Black History Month, B-200017, 60 Comp. Gen. 303 (1981) (live musical performance generally entertainment; exception for agency EEO cultural and ethnic programs)
  - (3) It is permissible to expend appropriated funds for entertainment if authorized by statute,. Golden Spike Nat’l Historic Site, B-234298, 68 Comp. Gen. 544 (1989) (statutory authority to conduct “interpretive demonstrations” includes authority to pay for musical entertainment at the 1988 Annual Golden Spike Railroader’s Festival); Claim of Karl Pusch, B-182357, Dec. 9, 1975 (unpub.) (Foreign Assistance Act authorized reimbursement of expenses incurred by Navy escort who took foreign naval officers to Boston Playboy Club—twice).
- d. Decorations. Agencies may purchase decorative items if consistent with work-related objectives and not for personal convenience. Department of State & Gen. Serv. Admin.—Seasonal Decorations, B-226011, 67 Comp. Gen. 87 (1987) (purchase of decorations proper); The Honorable Fortney H. Stark, B-217555, 64 Comp. Gen. 382 (1985) (personal Christmas cards not proper expenditure); Purchase of Decorative Items for Individual Offices at the United States Tax Court, B-217869, 64 Comp. Gen. 796 (1985) (expenditure on art work consistent with work-related objectives and not primarily for the personal convenience or personal satisfaction of a government employee). **NOTE: Practitioners should consider also the constitutional issues involved in using federal funds to purchase and display religious decorations (e.g., Christmas, Hanukkah, etc.)**
- e. Business Cards. An agency may use appropriated funds to purchase business cards for its employees. See Letter to Mr. Jerome J. Markiewicz, Fort Sam Houston, B-280759, Nov. 5, 1998 (purchase of business cards with appropriated funds for government employees who regularly deal with public or outside organizations is a proper “necessary expense” of the Army O&M account).

- (1) This case “overturned” a long history of Comptroller General’s decisions holding that business cards were generally a personal expense. See Forest Service – Purchase of Info. Cards, B-231830, 68 Comp. Gen. 467 (1989).
- (2) Military departments have implemented individual policies on use of appropriated funds for business cards. See AR 25-30, paragraph 11.11, (21 June 1999); AFIC 99-1 to DODD 5330.3/AFSUP; Department of the Navy memorandum, dated 9 March 1999.

f. Telephones. 31 U.S.C. § 1348.

- (1) Generally, appropriations are not available to install telephones in private residences or for tolls or other charges for telephone service from private residences. Centers for Disease Control and Prevention-Use of Appropriated Funds to Install Telephone Lines in Private Residence, B-262013, Apr. 8, 1996, 96-1 CPD ¶ 180 (appropriated funds may not be used to install telephone lines in Director’s residence); Use of Appropriated Funds to Pay Long Distance Tel. Charges Incurred by a Computer Hacker, B-240276, 70 Comp. Gen. 643 (1991) (agency may not use appropriated funds to pay the phone charges, but may use appropriated funds to investigate); Timothy R. Manns—Installation of Tel. Equip. in Employee Residence, B-227727, 68 Comp. Gen. 307 (1989) (telephone in temporary quarters allowed).
- (2) But see Federal Communications Commission – Installation of Integrated Services Digital Network, B-280698, Jan. 12, 1999 (agency may use appropriated funds to pay for installation of dedicated Integrated Services Digital Network (ISDN) lines to transmit data from computers in private residences of agency’s commissioners to agency’s local area network).

- (3) **NOTE:** DoD has statutory authority to use appropriated funds to install, repair, and maintain telephone lines in residences owned or leased by the U.S. Government and, if necessary for national defense purposes, in other private residences. 31 U.S.C. § 1348(c). Additionally, DoD may install telephone lines in certain volunteers' residences. Such volunteers are those who provide medical, dental, nursing, or other health-care related services; volunteer services for museum or natural resources program; or programs that support service members and their families. National Defense Authorization Act for FY 2000, Pub. L. No. 106-65, § 371, 113 Stat. 512 (1999).

g. Fines and Penalties.

- (1) Agencies generally may not use appropriated funds to pay fines and penalties incurred by employees. To The Honorable Ralph Regula, B-250880, Nov. 3, 1992 (military recruiter is personally liable for parking meter fines imposed for parking meter violations); Military members and employees may be reimbursed for paying a fine when the action for which the fine is imposed is a necessary part of the member's or employee's official duties.; To the Acting Attorney Gen., B-47769, 44 Comp. Gen. 313 (1964) (payment of contempt fine proper when incurred by employee pursuant to agency regulations and instructions).
- (2) Agencies may pay fines imposed on the **federal government** when Congress waives sovereign immunity. See, e.g., 10 U.S.C. § 2703(f) (Defense Environmental Restoration Account); 31 U.S.C. § 3902 (interest penalty).

h. Licenses and Certificates.

- (1) Agencies generally may not use appropriated funds to pay employees' fees incident to obtaining licenses or certificates. A. N. Ross, B-29948, 22 Comp. Gen. 460 (1942) (fee for admission to Court of Appeals).



- (2) Exception—When the license is primarily for the benefit of the government and not to qualify the employee for his position. National Sec. Agency—Request for Advance Dec., B-257895, Oct. 28, 1994 (unpub.) (drivers' licenses for scientists and engineers to perform security testing at remote sites); Air Force—Appropriations—Reimbursement for Costs of Licenses or Certificates, B-252467, June 3, 1994, (unpub.) (license necessary to comply with state-established environmental standards).

i. Unit or Regimental Coins and Similar Devices.

- (1) Generally, agencies may not use appropriated funds to purchase “mementos” such as regimental coins or similar devices for distribution. Such mementos are unauthorized personal gifts unless there is a direct link between the distribution of the items and the purpose of the appropriation. See EPA Purchase of Buttons and Magnets, B-247686, Dec. 30, 1992.
- (2) Congress has provided specific statutory authority for SECDEF to “award medals, trophies, badges, and similar devices” for “excellence in accomplishments or competitions.” 10 U.S.C. § 1125.
  - (a) For example, the Army has implemented this statute in AR 600-8-22, para. 11-1, which allows the presentation of awards for “excellence in accomplishments and competitions which clearly contribute to the increased effectiveness or efficiency of the military unit, that is, tank gunnery, weapons competition, military aerial competition.”

- (b) Army Regulation 600-8-22, ¶ 11-2 provides: “[h]owever, awards may be made on a one time basis where the achievement is unique and clearly contributes to increased effectiveness.” These awards could be made in the form of a coin, trophy, plaque or other similar device. The MACOM commander or head of the principal HQDA agency must approve the purchase of coins for distribution as awards. AR 600-8-22, para. 1-7d.
  - (c) The Air Force and Navy/Marine Corps have similar awards guidance. See generally AFPD 36-28 (1 Aug 97); SECNAVINST 3590.4A (28 Jan 78).
- (3) Unit or Regimental Coins. For a detailed discussion of the fiscal issues related to commanders’ coins, see Major Kathryn R. Sommercamp, *Commanders’ Coins: Worth Their Weight in Gold?*, ARMY LAW., Oct. 1997, at 6.
- (4) Similar Devices. See Air Force Purchase of Belt Buckles as Awards for Participants in a Competition, B-247687, 71 Comp. Gen. 346 (1992) (appropriated funds may be used to purchase belt buckles as awards for the annual “Peacekeeper Challenge”).
- (5) Comptroller General opinions come to different conclusions concerning awards to civilian employees, awards to military members, and incentive awards, because each has a separate statutory basis. See Air Force Purchase of Belt Buckles as Awards for Participants in a Competition, B-247687, 71 Comp. Gen. 346 (1992) (appropriated funds may be used to purchase belt buckles as awards for the annual “Peacekeeper Challenge”); Awarding of Desk Medallion by Naval Sea Systems Command, B-184306, Aug. 27, 1980 (unpub.) (desk medallions may be given to both civilian and military as awards for suggestions, inventions, or improvements).

- j. Use of Office Equipment. Use of Office Equipment in Support of Reserves and National Guard, B-277678, Jan. 4, 1999 (agency may authorize use of telephone and/or facsimile machine to respond to reserve unit recall notification as all government agencies have some interest in furthering the governmental purpose of, and national interest in, the Guard and Reserves). See Office of Personnel Management memorandum, dated 3 June 1999, which provides general guidance to assist federal agencies in determining under what circumstances employee time and agency equipment may be used to carry out limited National Guard or Reserve functions.

7. Miscellaneous Personal Expenses.

- a. Use of Appropriated Funds to Provide Fin. Incentives to Employees for Commuting by Means other than Single-Occupant Vehicle, B-250400, May 28, 1993 (unpub.) (if local air pollution control regulations require air pollution abatement plans, agencies may use appropriated funds for plan which subsidizes employees' costs for using other forms of commuting).
- b. Smithsonian Institution Use of Appropriated Funds for Legal Representation of Officers and Employees, B-241970.2, 70 Comp. Gen. 647 (1991) (payment of attorney fees improper).
- c. Defense Mapping Agency—Use of Imprest Funds for a Dremel Shoe Polisher, 1991 U.S. Comp. Gen. LEXIS 976, July 30, 1991 (unpub.) (shoe polisher not authorized).
- d. Department of the Navy—Purchase of Employee Identification Tags, B-237236, 69 Comp. Gen. 82 (1989) (name tags an authorized purchase).
- e. Office of Personnel Mgt.—Purchase of Air Purifiers, B-215108, July 23, 1984, 84-2 CPD ¶ 194 (purchase of air purifiers for common areas allowed).

- f. Expenditures by Dept. of Veterans Affairs Medical Center, B-247563.3, Apr. 5, 1996, 1996 U.S. Comp. Gen. LEXIS 414 (appropriated funds unavailable for employee participation in local sporting events).
  - g. Federal Executive Board - - Appropriations - - Employee Tax Returns - Electronic Filing, B-259947, Nov. 28, 1995, 96-1 CPD ¶ 129 (electronic filing of tax returns is a personal expense).
8. Expenditures for new or additional duties imposed by legislation or executive order with no additional appropriations provided.
- a. May current appropriations be charged?
  - b. Test: Are the new duties sufficiently related to the purpose of a previously enacted appropriation? The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984); Director, Nat'l Science Foundation, B-158371, 46 Comp. Gen. 604 (1967).

D. Expenditure Is Not Otherwise Prohibited by Law.

- 1. Constitutional Prohibitions.
- 2. Permanent Legislation Prohibitions. See, e.g., 10 U.S.C. § 2246 (prohibition on using appropriated funds to equip, operate, or maintain a DoD golf courses in CONUS unless designated remote and isolated).
- 3. Annual Appropriation Act or Authorization Act Prohibitions. See, e.g., DOD Appropriations Act, 2000, § 8149 (restriction on use of appropriated funds to pay fines or penalties imposed on DoD or military department arising from environmental violation at a military installation or facility unless payment is specifically authorized by law).

4. Agencies may presume that restrictions in an appropriation act are effective only for the fiscal year covered by the act. This presumption may be overcome if the restriction uses language indicating futurity, or if the legislation clearly indicates its permanent character. See Permanency of Weapon Testing Moratorium Contained in Fiscal Year 1986 Appropriations Act, B-222097, 65 Comp. Gen. 588 (1986) (restriction applicable to “this Act or any other Act” does not indicate futurity).

E. Expenditure Is Not Otherwise Provided For in a Separate Appropriation.

1. If there is another, more specific appropriation available, it must be used in preference to the more general appropriation. The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984) (may not use O&M funds when foreign assistance funds available).
  - a. That a specific appropriation is exhausted is immaterial. Secretary of Commerce, B-129401, 36 Comp. Gen. 386 (1956).
  - b. General appropriations may not be used as a back-up for a more specific appropriation. Secretary of the Navy, B-13468, 20 Comp. Gen. 272 (1940).
  - c. Limitation applies even if specific appropriation is included in the more general appropriation. Secretary of the Interior, B-14967, 20 Comp. Gen. 739 (1941).
2. If there are two appropriations equally available for expenditures not specifically mentioned in either appropriation:
  - a. The agency may choose either appropriation. Payment of SES Performance Awards of the R.R. Retirement Board’s Office of Inspector Gen., B-231445, 68 Comp. Gen. 337 (1989). Agency discretion is not questioned generally. Secretary of Agriculture, A-96689, 18 Comp. Gen. 285, 292 (1938).

- b. **BUT**, once the election is made, the agency must continue to use the selected appropriation to the exclusion of any other, during the current fiscal year. See Funding for Army Repair Projects, B-272191, Nov. 4, 1997. The election is binding even after the chosen appropriation is exhausted. Honorable Clarence Cannon, B-139510, May 13, 1959 (unpub.) (Rivers and Harbors Appropriation exhausted; Shipbuilding and Conversion, Navy, unavailable to dredge channel to shipyard).
- c. If Congress authorizes specifically the use of two accounts for the same purpose, the agency is not required to make an election between the two and is free to use both appropriations for the same purpose. See Funding for Army Repair Projects, *supra*. See also 10 U.S.C. § 166a (CINC Initiative Funds are in addition to amounts otherwise available for an activity).

#### IV. AUGMENTATION OF APPROPRIATIONS.

##### A. General Rule - Augmentation of Appropriations Is Not Permitted.

- 1. Augmentation is action by an agency that increases the effective amount of funds available in an agency's appropriation. Generally, this results in expenditures by the agency in excess of the amount appropriated by Congress originally.
- 2. Basis for the Augmentation Rule. An augmentation normally violates one or more of the following provisions:
  - a. Article I, Section 9, Clause 7, of United States Constitution:

No money shall be drawn from the treasury except in consequence of appropriations made by law.

b. 31 U.S.C. § 1301(a) (Purpose Statute):

Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.

c. 31 U.S.C. § 3302(b) (Miscellaneous Receipts Statute):

- (1) Except as . . . [otherwise provided] . . . an official or agent of the government receiving money for the government from any source shall deposit the money in the Treasury as soon as practical without any deduction for any charge or claim.
- (2) See Scheduled Airlines Traffic Offices, Inc. v. Dept. of Defense, 87 F3d. 1356 (D.C. Cir. 1996) (Contract for official and unofficial travel, which provided for concession fees to be paid to the local morale, welfare, and recreation account, violates Miscellaneous Receipts Statute). (**Note:** In the FY 1999 Defense Authorization Act, Congress enacted statutory language that permits commissions or fees in travel contracts to be paid to morale, welfare, and recreation accounts. See 10 U.S.C. § 2646.)

3. Examples of Augmentation.

- a. Augmenting by using one appropriation to pay costs associated with the purposes of another appropriation. This violates the Purpose Statute, 31 U.S.C. § 1301(a). Reimbursement of Registration Fees for Fed. Executive Board Training Seminar, B-245330, 71 Comp. Gen. 120 (1991); Nonreimbursable Transfer of Admin. Law Judges, B-221585, 65 Comp. Gen. 635 (1986); Department of Health and Human Servs.—Detail of Office of Community Servs. Employees, B-211373, 64 Comp. Gen. 370 (1984).

- b. Augmenting an appropriation by retaining government funds received from another source. This violates the Miscellaneous Receipts Statute, 31 U.S.C. § 3302(b). See Interest Earned on Unauthorized Loans of Fed. Grant Funds, B-246502, 71 Comp. Gen. 387 (1992). When the retained funds are expended, this generally violates the constitutional requirement for an appropriation. See Use of Appropriated Funds by Air Force to Provide Support for Child Care Centers for Children of Civilian Employees, B-222989, 67 Comp. Gen. 443 (1988); But see Bureau of Alcohol, Tobacco, and Firearms—Augmentation of Appropriations—Replacement of Autos by Negligent Third Parties, B-226004, 67 Comp. Gen. 510 (1988) (31 U.S.C. § 3302 only applies to **monies** received, not to other property or services).
- B. Receipts of Funds Authorized by Statutes. Many statutes authorize agencies to retain funds received from sources other than Congress. Some examples include:
1. Economy Act. 31 U.S.C. § 1535 authorizes interagency orders. The ordering agency must reimburse the performing agency for the costs of supplying the goods or services. See also 41 U.S.C. § 23 (project orders).
  2. Foreign Assistance Act. 22 U.S.C. § 2392 authorizes the President to transfer State Department funds to other agencies, including DoD, to carry out the purpose of the Foreign Assistance Act.
  3. Revolving Funds. Revolving funds are management tools that provide working capital for the operation of certain activities. The receiving activity must reimburse the funds for the costs of goods or services when provided. See 10 U.S.C. § 2208; National Technical Info. Serv., B-243710, 71 Comp. Gen. 224 (1992); Administrator, Veterans Admin., B-116651, 40 Comp. Gen. 356 (1960).
  4. Proceeds received from bond forfeitures, but only to the extent necessary to cover the costs of the United States. 16 U.S.C. § 579c; USDA Forest Serv.—Authority to Reimburse Gen. Appropriations with the Proceeds of Forfeited Performance Bond Guarantees, B-226132, 67 Comp. Gen. 276 (1988); National Park Serv.—Disposition of Performance Bond Forfeited to Gov't by Defaulting Contractor, B-216688, 64 Comp. Gen. 625 (1985) (forfeited bond proceeds to fund replacement contract).



5. Defense Gifts. 10 U.S.C. § 2608. The Secretary of Defense may accept monetary gifts and intangible personal property for defense purposes. However, these defense gifts may not be expended until appropriated by Congress.
6. Health Care Recoveries. 10 U.S.C. § 1095(g). Amounts collected from third-party payers for health care services provided by a military medical facility may be credited to the appropriation supporting the maintenance and operation of the facility.
7. Recovery of Military Pay and Allowances. Statutory authority allows the government to collect damages from third parties to compensate for the pay and allowances of soldiers who are unable to perform military duties as a result of injury or illness resulting from a tort. These amounts “shall be credited to the appropriation that supports the operation of the command, activity, or other unit to which the member was assigned.” 42 U.S.C. § 2651. The U.S. Army Claims Service has taken the position that such recoveries should be credited to the installation’s operation and maintenance account. See Affirmative Claims Note, *Lost Wages under the Federal Medical Care Recovery Act*, ARMY LAW., Dec, 1996, at 38.
8. Military Leases of Real or Personal Property. 10 U.S.C. § 2667(d)(1). Rentals received pursuant to leases entered into by a military department may be deposited in special accounts for the military department and used for facility maintenance, repair, or environmental restoration.
9. Damage to Real Property. 10 U.S.C. § 2782. Amounts recovered for damage to real property may be credited to the account available for repair or replacement of the real property at the time of recovery.
10. Proceeds from the sale of lost, abandoned, or unclaimed personal property found on an installation. 10 U.S.C. § 2575. Proceeds are credited to operation and maintenance account and used to pay for collecting, storing, and disposing of the property. Remaining funds may be used for morale, welfare, and recreation activities.
11. Host nation contributions to relocated armed forces within a host country. 10 U.S.C. § 2350k.

- C. Other Authorized Retention of Receipts and Use of Appropriations. In addition to the statutory authorities detailed above, the Comptroller General recognizes other exceptions to the Miscellaneous Receipts Statute, including:
1. Replacement Contracts. An agency may retain recovered excess procurement costs to fund replacement contracts. Bureau of Prisons—Disposition of Funds Paid in Settlement of Breach of Contract Action, B-210160, Sept. 28, 1983, 84-1 CPD ¶ 91.
    - a. This rule applies regardless of whether the government terminates for default or simply claims for damages due to defective workmanship.
    - b. The replacement contract must be coextensive with the original contract, i.e., the agency may procure only those goods and services which would have been provided under the original contract.
    - c. Amounts recovered that exceed the actual costs of the replacement contract must be deposited as miscellaneous receipts.
  2. Refunds.
    - a. Refunds for erroneous payments, overpayments, or advance payments may be credited to agency appropriations. Department of Justice—Deposit of Amounts Received from Third Parties, B-205508, 61 Comp. Gen. 537 (1982) (agency may retain funds received from carriers/insurers for damage to employee's property for which agency has paid employee's claim); International Natural Rubber Org.—Return of United States Contribution, B-207994, 62 Comp. Gen. 70 (1983).
    - b. Amounts that exceed the actual refund must be deposited as miscellaneous receipts. Federal Emergency Mgmt. Agency—Disposition of Monetary Award Under False Claims Act, B-230250, 69 Comp. Gen. 260 (1990) (agency may retain reimbursement for false claims, interest, and administrative expenses in revolving fund; treble damages and penalties must be deposited as miscellaneous receipts).

- c. Funds recovered by an agency for damage to government property, unrelated to performance required by the contract, must be deposited as miscellaneous receipts. Defense Logistics Agency—Disposition of Funds Paid in Settlement of Contract Action, B-226553, 67 Comp. Gen. 129 (1987) (negligent installation of power supply system caused damage to computer software and equipment; insurance company payment to settle government's claim for damages must be deposited as miscellaneous receipts).
  - d. Refunds must be credited to the appropriation charged initially with the related expenditure, whether current or expired. Accounting for Rebates from Travel Mgmt. Center Contractors, B-217913.3, June 24, 1994 (unpub.); To the Secretary of War, B-40355, 23 Comp. Gen. 648 (1944). This rule applies to refunds in the form of a credit. See Principles of Fed. Appropriations Law (2d ed.), Vol. II, p. 6-111, GAO/OGC 92-13 (1992), Appropriation Accounting—Refunds and Uncollectibles, B-257905, Dec. 26, 1995, 96-1 CPD ¶ 130 (recoveries under fraudulent contracts are refunds, which should be credited to the original appropriation, unless the account is closed; if debts are written off as uncollectible, a charge must be made to an account that is current at the time of the write off).
3. Receipt of property other than cash. When the government receives a replacement for property damaged by a third party in lieu of cash, the agency may retain the property. Bureau of Alcohol, Tobacco, and Firearms—Augmentation of Appropriations—Replacement of Autos by Negligent Third Parties, B-226004, 67 Comp. Gen. 510 (1988) (replacement by repair of damaged vehicles).
  4. Funds held in trust for third parties. When the government receives custody of cash or negotiable instruments that it intends to deliver to the rightful owner, it need not deposit the funds into the treasury as a miscellaneous receipt. The Honorable John D. Dingell, B-200170, 60 Comp. Gen. 15 (1980) (money received by Department of Energy for oil company overcharges to their customers may be held in trust for specific victims).

5. Nonreimbursable Details.

a. The Comptroller General has held that nonreimbursable agency details of personnel to other agencies are generally unallowable. Department of Health and Human Servs.—Detail of Office of Community Servs. Employees, B-211373, 64 Comp. Gen. 370 (1985).

b. Exceptions.

(1) A law authorizes nonreimbursable details. See, e.g., 3 U.S.C. § 112 (nonreimbursable details to White House); The Honorable William D. Ford, Chairman, Comm’n on Post Office and Civil Serv., House of Representatives, B-224033, Jan. 30, 1987 (unpub.).

(2) The detail involves a matter similar or related to matters ordinarily handled by the detailing agency and will aid the detailing agency’s mission. Details to Congressional Comms., B-230960, Apr. 11, 1988 (unpub.).

(3) The detail is for a brief period, entails minimal cost, and the agency cannot obtain the service by other means. Department of Health and Human Servs. Detail of Office of Community Servs. Employees, B-211373, 64 Comp. Gen. 370 (1985).

**V. SPECIAL PROBLEMS.**

A. Investment/Expense Threshold.

1. Expenses are costs of resources consumed in operating and maintaining DoD, and are normally financed with O&M appropriations. See DoD 7000.14-R, Fin. Mgmt. Reg., vol. 2A, ch 1. Expenses generally include:

a. Labor of civilian, military, or contractor personnel;

- b. Rental charges for equipment and facilities;
  - c. Food, clothing, and fuel;
  - d. Maintenance, repair, overhaul, and rework of equipment;
  - e. Real property maintenance, repair, and O&M funded minor construction projects; and
  - f. Assemblies, spare and repair parts, and other items of equipment not designated for centralized management and costing **less than \$100,000**. The Department of Defense Appropriations Act, 2000, Pub. L. No. 106-79, § 8046, 113 Stat. 1212 (1999).
2. Investments are the acquisition costs of DoD capital assets, and are normally financed with procurement appropriations. These costs benefit future periods and tend to have a long-term character. Investments generally include:
- a. All equipment items having a system unit cost **equal to or greater than \$100,000**; and
  - b. Construction, including equipment installed and made an integral part of the facilities.
3. Various audits have revealed a systemic problem of local activities using O&M appropriations to acquire computer systems costing more than the investment/expense threshold (currently \$100,000). This constitutes a violation of the Purpose Statute, and may result in a violation of the Antideficiency Act.
- a. Agencies must consider the “system” concept when evaluating the procurement of Information Mission Area (IMA) end items. The determination of what constitutes a “system” must be based on the **primary function** of the hardware and software to be acquired, as stated in the approved requirements document.

- b. A system exists if a number of components are designed primarily to function within the context of a whole and will be interconnected to satisfy an approved requirement.
  - c. Agencies may purchase multiple end items of equipment (e.g., computers), and treat each end item as a separate “system” for funding purposes, if the primary function of the end item is to operate independently.
  - d. Include standard off-the-shelf software as part of the total system cost when purchased as part of initial acquisition of equipment.
  - e. Fragmented or piecemeal acquisition of a documented requirement may not be used to circumvent the “system” concept.
4. **EXAMPLE**—Acquisition of 100 stand-alone computers and software at \$2,000 each, purchased primarily to operate as independent workstations. Agencies may use O&M funds for this acquisition.

B. Official Representation Funds.

- 1. Definition. Representation funds are appropriations made available to the executive branch that may be expended without the normal statutory controls and are appropriated for "emergency and extraordinary expenses." Congress has provided representation funds throughout our history for use by the President and other senior agency officials. See Act of March 3, 1795, 1 Stat. 438. Representation funds have strict regulatory controls because of their limited availability and potential for abuse.
  - a. Controls.
    - (1) Statutory limitations.
      - (a) 10 U.S.C. § 127. Emergency and extraordinary expenses.

- (i) Authorizes the Secretary of Defense and the Secretary of a military department to spend representation funds on "any purpose he determines to be proper, and such a determination is final and conclusive upon the accounting officers. . ."
- (ii) Requires a quarterly report of such expenditures to the Congress.
- (iii) Congressional notice requirement. Pub. L. No. 104-106, § 915, 110 Stat 186, 413 (amending 10 U.S.C. § 127).
  - (a) Amounts in excess of \$1 million -- 15 days advance notice prior to obligation or expenditure.
  - (b) \$500 000 - \$1 million -- 5 days advance notice.
  - (c) Exception to notification requirement if Secretary of Defense determines that national security objectives will be compromised.
- (b) Other executive agencies may have similar controls. See, e.g., 22 U.S.C. § 2671 (authorizes State Department to pay for "unforeseen emergencies").

b. Appropriations language.

- (1) For DoD, Congress provides representation funds as a separate item in the operation and maintenance appropriation. Obligation in excess of the limitation is a violation of 31 U.S.C. § 1341.

- (2) Not all agencies receive representation funds. Other appropriations may not be used for representational purposes. See HUD Gifts, Meals, and Entertainment Expenses, B-231627, 68 Comp. Gen. 226 (1989); United States Embassy London — Use of Representational Funds for Reimbursement of Rental of Ceremonial Dress, B-235916, 68 Comp. Gen. 638 (1989) (State Department may use its representation allowances to pay the expenses of the Department in providing proper representation of the United States and its interests).

c. Internal agency guidance.

- (1) DoD Dir. 7250.13, Official Representation Funds (23 February 1989).
- (2) AR 37-47, Representation Funds of the Secretary of the Army (31 May 1996); AFI 65-603, Official Representation Funds: Guidance and Procedures (1 Nov 1997); SECNAV 7042.7, Guidelines for Use of Official Representation Funds (5 Dec 1998).

d. Procedures for Use of Representation Funds.

- (1) Administrative categories of representation funds.
- (2) Limitation .0012--Miscellaneous Expenses, Category A (Official Representational Funds). AR 37-47, para. 1-5a. These funds are available to extend official courtesies to dignitaries, officials, and foreign governments. AR 37-47, para. 2-1a.
- (3) Limitation .0014--Miscellaneous Expenses, Category B (other than official representation, such as Armed Services Board of Contract Appeals witness fees and settlements of claims). AR 37-47, para. 1-5b. Other examples include:



- (a) Acquisition of weapons from Panamanian civilians. (currently considered to be a proper expenditure of operation and maintenance funds);
  - (b) Reward for search teams at the Gander air crash; and
  - (c) Mitigation of erroneous tax withholding of soldiers' pay.
- (4) Limitation .0015--Criminal Investigation Activities (AR 195-4, CID investigation support). AR 37-47, para. 1-5c. See AFI 71-101, para. 1.12 (use of representation funds to support Air Force OSI operations).
- (5) Limitation .0017--Intelligence Contingency Funds (AR 381-141(C)). AR 37-47, para. 1-5d. See AFI 71-101, para. 1.12 (Air Force counterintelligence representation funds).
- e. Official courtesies. Official representation funds are primarily used for extending official courtesies to authorized guests. AR 37-47, para. 2-1. See AFI 65-603, para.1; SECNAVINST 7042.7J, para. 6. Official courtesies are subject to required ratios of authorized guests to DoD personnel. See, e.g., AR 37-47, paras 2-1b and 2-5. Courtesies are defined as:
  - (1) Hosting of authorized guests to maintain the standing and prestige of the United States;
  - (2) Luncheons, dinners, and receptions at DoD events in honor of authorized guests;
  - (3) Entertainment of local authorized guests for civic or community relations;
  - (4) New commander receptions;

- (5) Entertainment of authorized guests incident to visits by U.S. vessels to foreign ports and foreign vessels to U.S. ports;
  - (6) Official functions in observance of foreign national holidays and similar occasions in foreign countries; and
  - (7) Dedication of facilities.
- f. Gifts. Official representation funds may be used to purchase, gifts, mementos, or tokens for authorized guests.
  - (1) No more than \$260.00. See AR 37-47, para. 2-9a(1). See also AFI 65-603, para. 4; SECNAVINST 7042.7J, para. 6c(1).
  - (2) No gifts to DoD personnel. AR 37-47, para. 2-9c. See also AFI 65-603, para. 4; SECNAVINST 7042.7J, para. 6c(1).
- g. Levels of expenditures. Levels of expenditures are to be “modest.” AR 37-47, para. 2-2a; AFI 65-603, para. 1-2 (\$10,000 per event threshold - AR 37-47, para. 2-2b).
- h. Prohibitions on Using Representational Funds. AR 37-47, para. 2-10; AFI 65-603, para. 5; SECNAVINST 7042.7J, para. 6d.
  - (1) Any use not specifically authorized by regulation requires an exception to policy. AR 37-47, para. 2-10; AFI 65-603, para. 10.
  - (2) In accordance with AR 37-47, para. 2-10 (see AFI 65-603, para. 5), exceptions will not be granted for the following:
    - (a) Classified projects and intelligence projects;
    - (b) Entertainment of DoD personnel, except as specifically authorized by regulation;

- (c) Membership fees and dues;
  - (d) Personal expenses (i.e., Christmas cards, calling cards, clothing, birthday gifts, etc.);
  - (e) Gifts and mementos an authorized guest wishes to present to another;
  - (f) Personal items (clothing, cigarettes, souvenirs);
  - (g) Guest telephone bills;
  - (h) Any portion of an event eligible for NAF funding, except for expenses of authorized guests; and
  - (i) Repair, maintenance, and renovation of DoD facilities.
- (3) Retirements and change of command ceremonies, unless approved in advance by the Secretary of the Army (SA). AR 37-47, para. 2-4g. See AFI 65-603, para. 5.1; SECNAVINST 7042.7J, para. 6d(10); United States Army School of the Americas--Use of Official Representation Funds, B-236816, 69 Comp. Gen. 242 (1990) (new commander reception distinguished from change of command ceremony).
- i. Approval and accounting procedures. AR 37-47, Chapter 3. See AFI 65-603, para 4; SECNAVINST 7042.7J, para 8.
- (1) Fiscal year letters of authority. AR 37-47, para. 3-1b.
  - (2) Written appointment of certifying and approving officer.
  - (3) Written appointment of representation fund custodian.

(4) Funds must be requested and made available before obligation. Requests for retroactive approval must be forwarded to the SA or his designee. AR 37-47, para. 3-1d.

(5) Legal review. AR 37-47, para. 3-1f(2).

2. Community Relations and Public Affairs Funds. AR 360-61, Community Relations (15 Jan. 1987).

a. Public affairs funds are not a separate subdivision of the operation and maintenance account.

b. Do not use public affairs funds to supplement official representation funds. Doing so violates 31 U.S.C. § 1301.

C. Minor Construction.

1. Generally, agencies may not erect, repair, or improve a public building absent a specific appropriation from Congress. 41 U.S.C. § 12; The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984).

2. Congress has given DoD specific statutory authority to use **up to \$500,000 in operation and maintenance funds** for unspecified minor construction projects. 10 U.S.C. § 2805(c).

3. The \$500,000 limitation applies to each project. A “project” includes all work necessary to produce a complete and usable facility or a complete and usable improvement to an existing facility. 10 U.S.C. § 2801(b). See The Honorable Michael B. Donley, B-234326.15, Dec. 24, 1991 (unpub.) (Air Force improperly split project involving a group of twelve related buildings into multiple projects).

D. Deployments. See The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984).

1. Construction.
2. Foreign Humanitarian Assistance.
3. Foreign Military Assistance.
4. U.S. Military Training.

## **VI. CONCLUSION.**

